

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

A National Broadband Plan for Our Future

GN Docket No. 09-51

**JOINT COMMENTS OF THE MASSACHUSETTS BROADBAND INSTITUTE AND
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

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I. INTRODUCTION

The Massachusetts Broadband Institute (“MBI”)¹ and the Massachusetts Department of Telecommunications and Cable (“MDTC”)² (collectively, the “Joint Commenters”) respectfully submit these comments pursuant to the Notice of Inquiry (“NOI”) issued by the Federal Communications Commission (“Commission”) on April 8, 2009, in the above-referenced docket.³

The Joint Commenters applaud the Commission’s request for input and its collaborative, transparent and open approach with regard to its Broadband Plan and thank the Commission for the opportunity to comment. Through these comments, the Joint Commenters seek to provide not only input to portions of the Commission’s Broadband Plan NOI, but also to exemplify the ability of multiple agencies with different legislative directives to coordinate and collaborate on a single issue that affects multiple areas.

¹ The MBI is a quasi-public agency tasked by Governor Deval Patrick to meet the broadband access needs of unserved citizens throughout the Commonwealth and manages a statewide Massachusetts Broadband Incentive Fund with up to \$40 million to incentivize public/private partnerships which result in new broadband deployment solutions. *See An Act Establishing and Funding the Massachusetts Broadband Institute*, Chapter 231 of the Acts of 2008, available at <http://www.massbroadband.org/legislation/BroadbandActsSigned8408.pdf>. In addition, on May 26, 2009, Governor Patrick designated the MBI “as the Commonwealth’s aggregator for a coordinated filing to the National Telecommunications and Information Administration for broadband competitive grants applications [under the American Recovery and Reinvestment Act] to ensure a balanced portfolio of applications that will meet the Commonwealth’s diverse broadband needs.” “Governor Patrick Takes Steps to Secure Federal Recovery Funding for Broadband Expansion – Holds broadband development forum, unveils interactive mapping tool at New Salem town hall,” Office of the Governor Press Release, issued May 26, 2009, available at http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=090526_funding_broadband_expansion&csid=Agov3 (“Governor’s Office May 26 Press Release”). The MBI’s mission is to extend affordable high-speed Internet access to all homes, businesses, schools, libraries, medical facilities, government offices and other public places across the Commonwealth. *See* MBI Mission Statement, available at www.massbroadband.org.

² The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts (“Commonwealth”). *See* Massachusetts General Laws (“M.G.L.”) c. 25C, §1. The MDTC’s mission is to support competition in telecommunications and cable services in the Commonwealth and to protect the public interest by ensuring that customers of these services are treated consistently with the MDTC’s regulations. *See* MDTC Mission Statement, available at www.mass.gov/dtc.

³ *See In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) (“Broadband Plan NOI”).

II. DISCUSSION

A. Intergovernmental Coordination and Collaboration Between Federal and State Entities is Necessary

Congress directs the Commission to develop a national broadband plan that will ensure that all Americans will have access to broadband and requires that the Commission establish benchmarks to achieve this goal.⁴ Assuredly, this is a daunting task relative to the number of stakeholders. The Commission inquires as to “how a coordinated effort among federal departments and agencies; tribal, state, and local governments; and interested groups and individuals”⁵ may help to reach this goal and recognizes that increased coordination between these parties “is a critical preliminary step towards ensuring that the various government programs accomplish ... broadband goals and objectives in an efficient and effective way.”⁶ In other words, coordination is key. Efficiency and long-term effectiveness of “[h]igh-speed ubiquitous broadband” throughout America will require, specifically, intergovernmental coordination and collaboration between federal and state entities, since states are uniquely positioned to coordinate with federal agencies to bring broadband to our nation’s unserved and underserved citizens.⁷

Although addressing state use of Federal monies towards broadband investment, a recent White Paper filed with the Commission aptly lists, in part, states’ “unique circumstances” or

⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“Recovery Act”), § 6001(k)(2).

⁵ Broadband Plan NOI at ¶ 112.

⁶ Acting FCC Chairman Copps Report “Bringing Broadband to Rural America – Report on a Rural Broadband Strategy,” at 5 (May 22, 2009) (“Rural Broadband Report”).

⁷ Broadband Plan NOI at ¶ 1.

qualifications.⁸ The Commission should ensure state involvement with its broadband plan because of these unique qualifications. First, states have intimate knowledge of local conditions.⁹ Second, states have pre-existing relationships that will help them quickly coordinate the deployment of broadband infrastructure as well as education programs aimed at increasing broadband adoption and demand.¹⁰ Third, state policy-makers are best able to proactively link broadband expansion to economic development.¹¹ Fourth, state policy makers will take into account the needs of the entire state.¹² They will encourage the building of robust networks that are interconnected, redundant, and capable of being utilized by multiple constituents such as residents, businesses, public safety, public health, and education and will not represent isolated or stranded investments.¹³ Finally, states, like the federal government and other governmental authorities, are publicly accountable.¹⁴ For these reasons, the Commission should ensure that any broadband plan going forward seeks to incorporate state assistance.

⁸ *In the Matter of a Rural Broadband Strategy*, GN Docket No. 09-29, MDTC Comments Attachment “Broadband Investment for Economic Recovery: Perspectives of an Ad-Hoc Group of State Broadband Entities,” at 2-3, filed Mar. 25, 2009 (“White Paper”). This White Paper was submitted to President Obama, House Speaker Nancy Pelosi, and Senate Majority Leader Harry Reid on Feb. 9, 2009, by broadband officials and experts from the states of Arizona, Georgia, Maine, Massachusetts, New York, North Carolina, and South Carolina, and is available electronically at <http://www.massbroadband.org/docs/BroadbandInvestmentMultiStatePaper.pdf>.

⁹ White Paper at 2.

¹⁰ White Paper at 2.

¹¹ White Paper at 2.

¹² White Paper at 3.

¹³ White Paper at 3.

¹⁴ White Paper at 3.

B. Data Collection and Broadband Mapping are Integral First Steps

Data collection and broadband mapping are integral first steps for any broadband plan going forward, and state authorities can be an invaluable source of information for the Commission.

1. Data Collection Requires State Involvement

Congress requires the Commission's final broadband plan to include "a plan for use of broadband infrastructure and services[.]"¹⁵ and the Commission inquires as to whether it should seek to collect additional data, in part, from governmental entities in creation of this latter plan.¹⁶ The Joint Commenters agree that the Commission *should* seek to collect this additional information and, furthermore, such data collection necessarily requires state involvement. For instance, states such as Massachusetts have already instituted and will continue to utilize a wide variety of approaches to encourage the development of broadband infrastructure.¹⁷ The Commission could request that applicable state and local governmental entities file on a voluntary basis an annual status report to describe their respective state/local governmental broadband programs and activities. Uniformity of information could be achieved through a Commission-created template report for interested parties to file. In addition, because several states have already implemented mapping efforts,¹⁸ the Commission should seek to obtain the

¹⁵ Recovery Act § 6001(k)(2)(D).

¹⁶ Broadband Plan NOI at ¶ 33.

¹⁷ White Paper at 3, 5-6.

¹⁸ White Paper at 2. Massachusetts, for instance, has an existing broadband map created in 2007 based on a survey conducted by the John Adams Innovative Institute. See Massachusetts Executive Office of Housing and Economic Development Press Release, "State to Identify High-Priority Broadband Investment Targets Through Advanced Mapping Technologies," at 1 (rel. May 6, 2009), available at <http://www.massbroadband.org/docs/MBIGISRelease050609L.pdf>. In partnership with the Massachusetts Geographic Information System, MBI is implementing a new mapping project to identify the availability of

maps and data already garnered by states. Finally, as the Commission has noted, any entity, including any state entity, that receives funding under the Broadband Technology Opportunities Program (“BTOP”) will be required to file a quarterly report to be made publicly available on the use of the funds received.¹⁹ Because these reports are to be publicly available, the Commission could easily obtain copies.

In addition, any further or amended reporting obligations for service providers should be mandatory, not voluntary, and the Commission needs to clarify that states can compel and receive the same information about broadband deployment as federal authorities.²⁰ As the Commission acknowledges, agency attempts to collect any information on a voluntary basis are not always successful.²¹ This difficulty rings true for other entities seeking data as well.²²

Furthermore, because several states such as Massachusetts have already implemented their own broadband deployment efforts, the collection and sharing of this data is vital to the effective and

broadband access at a much more detailed level than the 2007 map, based on mapping of broadband infrastructure by individual block. *Id.* This mapping project will initially focus on western Massachusetts, where problems with broadband coverage are most acute. *Id.* Furthermore, Governor Patrick on May 26, 2009, unveiled a new interactive mapping tool using Google mapping technology made possible by the MBI and the MGIS that enables broadband users to pinpoint their homes, businesses, or schools location on a map and enter their current mode of access to the Internet. *See* Governor’s Office May 26 Press Release. This survey is available through MBI’s website at <http://massbroadband.org/mapping/survey.html>.

¹⁹ Broadband Plan NOI at ¶ 62; Recovery Act § 6001(i)(1).

²⁰ Joint Comments of the Vermont Department of Public Service, the Massachusetts Broadband Institute, and the Massachusetts Department of Telecommunications and Cable, *In the Matter of the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act*, GN Docket No. 09-40, at 8 (filed Apr. 13, 2009), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520210451 (“VT DPS, MDTC, MBI Jt. Comments”). In fact, the Commission should clarify that any information gathered by the Commission be made available to states.

²¹ Broadband Plan NOI Appendix at n.50.

²² *See e.g.*, National Regulatory Research Institute Report, “Competitive Issues in Special Access Markets,” Rev. Ed., at 34-38, available at http://www.naruc.org/Publications/09%200121%20NARUC%20NRRI_spec_access_mkts_jan09-02%202_.pdf (discussing the data collection attempts for this report).

efficient deployment of broadband nationwide.²³ Accordingly, any mandatory filing requirements need to be coupled with clear penalties for failure to comply. Finally, in order to ensure that progress in any area can be accurately tracked, this level of data collection needs to occur on a biannual or annual basis.

2. There Should Exist a Single, Central Repository Website that is Publicly Accessible

The Commission inquires as to whether there should be “a single website that all departments and agencies tasked with implementing broadband initiatives may use to inform members of the public regarding their programs”²⁴ and as to “how the federal government can use web-based systems to coordinate broadband rollout with tribal, state, and local governments and other interested groups and individuals.”²⁵ The Joint Commenters whole-heartedly support the recommendation that “the public would benefit enormously from the availability of one access point that serves as a central repository for information about all federal programs addressing ... broadband deployment.”²⁶ In fact, this central repository should include access to state and local initiatives information and/or links. Ideally, this central repository would be a website organized, in part, by an alphabetical listing of states and U.S. territories.²⁷ Each state or

²³Joint Comments of the MDTC and the Massachusetts Geographic Information System, *In the Matter of Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected VoIP Subscribership*, WC Docket No. 07-38, at 2 (filed Aug. 1, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520036652 (“MDTC/MGIS Jt. Comments”).

²⁴ Broadband Plan NOI at ¶ 117.

²⁵ Broadband Plan NOI at ¶ 118.

²⁶ Rural Broadband Strategy at ¶ 74.

²⁷ Multi-state, regional programs could be listed separately.

territory should have specific descriptions and links to federal, state, local, and private broadband programs, in order to permit any interested user to easily access a listing of state- and territory-specific broadband infrastructure and deployment programs. The programs could be further demarcated by the type of program – for instance, public versus private programs, public-private partnerships, Recovery Act-specific programs, or any other array of topics. Furthermore, in order to ensure that the information is relatively up-to-date, the entity responsible for this central repository website could seek annual certifications from applicable entities certifying the accuracy of, or updating, the data contained therein.

3. Commission Form 477 Provides Insufficient Detail and Needs to be Revamped

The Joint Commenters commend the Commission’s ongoing efforts to obtain the most accurate and reliable broadband data available, including its multiple revisions to Commission Form 477.²⁸ These repeated efforts show that data collection is by necessity an ongoing process that requires repeated amendment as technologies and markets evolve. Despite the Commission’s efforts, however, the Joint Commenters assert that the level of data garnered from Form 477 is still insufficient to provide an accurate portrayal of the current market, let alone the evolving market.

In response to the Commission’s inquiries with regard to the sufficiency of the current data gathered by the Commission, the MDTC and MBI have previously touched upon this

²⁸ Broadband Plan NOI Appendix at ¶¶ 13-14. See e.g., *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717 (2000) (“2000 Data Gathering Order”); *Local Telephone Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, 19 FCC Rcd 22340 (2004) (“2004 Data Gathering Order”); *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008) (“2008 Data Gathering Order”).

topic.²⁹ For instance, despite the Commission’s determinations with regard to Census Tract level information made in its *2008 Data Gathering Order*,³⁰ the Joint Commenters affirm previous statements that Form 477 Census Tract level information provides insufficient detail in rural areas.³¹ In addition, because of the notice requirements established involving BTOP monies³² and the general broadband plan requirement under the Recovery Act, necessity dictates a certain uniformity of information being collected going forward. As stated previously:

The [Department of Commerce’s National Telecommunications and Information Administration (“NTIA”)] and FCC should work collaboratively to modify rules and regulations [that pertain] to reporting requirements for broadband and telecommunications providers. Data collection methods must be consistent and comparable[,] [and] [c]ompanies must be required to submit complete and accurate information ... at a higher level of detail than is currently defined in ... Form 477.³³

The Form 477 is insufficient for several reasons. Specifically, the capture of service provisioning at the zip code level, even when moving from a 5-digit to 9-digit reporting, may overstate the availability of service. For instance, the condition that a carrier is serving at least one customer within a broad geographic territory does not necessarily mean that the carrier has the ability to deliver service to all facilities within that territory without further capital investment (“flip the switch” capability). Furthermore, based upon the MDTC’s own data-collection experiences utilizing certain Form 477 information, some Form 477 data appears to be based upon billing address information rather than service address information, which may lead

²⁹ VT DPS, MDTC, MBI Jt. Comments at 8.

³⁰ *2008 Data Gathering Order* at ¶¶ 10-18.

³¹ VT DPS, MDTC, MBI Jt. Comments at 8.

³² *Supra* at 5.

³³ VT DPS, MDTC, MBI Jt. Comments at 8.

to an instance where a customer requested billing to an address outside of a zip code where the carrier is able to provide service. Since carriers might report the billing address zip code as “served” on Form 477, this would be an overstatement of actual service coverage. Indeed, reporting one customer as “served” in a zip code can literally mean that hundreds of unserved citizens are incorrectly reported as having service.

It is the MDTC’s experience that requiring higher levels of datasets (i.e., Census Tract or, specifically, zip-code levels) can be deceptive as to what level of service is actually provided in that area and whether consumers truly even have a competitive option available to them in their area, especially in rural areas. By way of analogy, in the cable regulatory context, the MDTC has seen first-hand how lack of analysis of granular data can lead to skewed determinations regarding service availability and franchise areas deemed to have so-called “effective competition.” The Commission need only look to [mis]application of the “competing provider test” for effective competition of multi-channel video programming distributors (satellite versus wired services) within rural areas as an example.³⁴

In western Massachusetts, for instance, many communities are characterized by large areas of low population density and mountainous topography, making wide-spread cable coverage, especially outside of town centers, highly cost-prohibitive. As a result, large sections of communities located in this part of the state remain unwired and have no video option (or analogous broadband connection option) other than Direct-To-Home (“DTH”) satellite service,

³⁴ See e.g., 47 U.S.C. § 623(1)(1)(A); *In the Matters of Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership and 25 Petitions for Determinations of Effective Competition in Various Communities in the State of New York and the Commonwealth of Pennsylvania*, CSR 7234-E *et. al.*, Memorandum Opinion and Order, DA 08-1893, at ¶ 10 (rel. Aug. 13, 2008) (indicating that the Petitioner’s data was inaccurate and unreliable because the numbers provided indicated a subscribership level that exceeded 100 percent of the households in the franchise area and finding that “five-digit zip codes ... [may] cover large areas and many households outside the franchise area.”).

which is chosen by consumers by default. In other words, if consumers want to order from multi-channel video providers in these areas they are forced to opt for satellite, because wired cable service is not available to them. Because these unwired households are located within a franchise area that may also include wired households, their satellite subscriptions are included in the calculation of the franchise area DTH penetration rate. As a result, under the Commission's current analysis for the "competing provider test," false conclusions can be made since satellite video subscriptions may not be the result of competitive choice. The Commission needs to take steps to avoid these types of inconsistencies, not only with video providers, but also going forward with broadband providers.

4. Data Collection Needs to Occur at the GIS or Address Level

With regard to broadband data collection, the best format level would be standardized digital Geographic Information System ("GIS") coverage maps or, alternatively, at the range-of-address or individual address level whereby, at a minimum, the number of providers, bandwidths speeds (upload and download), and the price(s) available are listed at any level.³⁵ Use of a digital format would offer the greatest advantage to state and federal policymakers and would ensure that each state's data can be easily parsed and sorted.³⁶ As indicated in earlier comments, if information is collected at the street and address level, utilized through GIS layers and overlays, then the data can be aggregated more accurately in different forms (such as through town, county, area code, legislative district, political subdivision, Census Tract level, etc...) and

³⁵ VT DPS, MDTC, MBI Jt. Comments at 7-8; MDTC/MGIS Jt. Comments at 3. In addition, in order to ensure the most efficient use of any federal money allocated for broadband infrastructure and services, granularity of data at the smallest level with regard to actual service conditions is imperative.

³⁶ MDTC/MGIS Jt. Comments at 3-4.

be utilized more efficiently when it is represented on a map.³⁷ This level of data collection will permit greater diversity in how different regions of the country represent their localities, for instance.³⁸ In addition, as broadband deployment evolves, this will permit both public and private entities to more easily assess how to refocus their resources.³⁹

For further clarity, multiple maps should be produced to illustrate different dimensions of broadband, such as availability, affordability, or quality.⁴⁰ In addition, the terrestrial broadband map(s) and geospatial datasets should include the following elements: (1) roads showing all E-911 locations; (2) road segments coded as to their availability of DSL, cable, or fiber Internet service; and (3) anticipated speeds for each service type.⁴¹ Furthermore, fixed and mobile wireless maps should include the following: (1) frequencies; (2) locations of all towers; (3) signal strength; (4) direction of antennae; (5) anticipated speeds; (6) name of service provider(s); (7) mobile platform used, such as LTE, CDMA, etc.⁴² Finally, WiFi Hotspots that are open to the public should be identified if they are publicly owned and freely accessible.⁴³

³⁷ VT DPS, MDTC, MBI Jt. Comments at 8; MDTC/MGIS Jt. Comments at 4.

³⁸ VT DPS, MDTC, MBI Jt. Comments at 8; MDTC/MGIS Jt. Comments at 4. For instance, the state government in Massachusetts typically designates many of its programs by city or town.

³⁹ MDTC/MGIS Jt. Comments at 4.

⁴⁰ VT DPS, MDTC, MBI Jt. Comments at 7.

⁴¹ VT DPS, MDTC, MBI Jt. Comments at 7.

⁴² VT DPS, MDTC, MBI Jt. Comments at 7. In addition, considering wireless service requires a clear path to obtain the signal that may be affected by localized conditions, a list of service-capable addresses may not be practical. Instead, wireless providers should be asked to provide maps of their service coverage which provide estimates of service signal strength to mass market consumers throughout each of the carriers' territories.

⁴³ VT DPS, MDTC, MBI Jt. Comments at 7.

The Joint Commenters recognize that not all operators have standard coverage maps in digital format.⁴⁴ For instance, the experience of the MDTC in collecting strand maps from cable providers has shown that providers that acquired older legacy systems often do not have such maps for the legacy service territories.⁴⁵ Consequently, it could be time-consuming for providers to have to create them.⁴⁶

When digital coverage maps are not practical, or should the Commission determine that this approach is not appropriate, then the Commission should require a subscriber list approach in which each data record indicates a range of addresses where service availability exists (e.g., 100-400 Main Street).⁴⁷ The providers would not be significantly burdened by producing this data from the internal databases which they use to support service dispatch and billing.⁴⁸ This methodology would only require a simple parsing and sorting algorithm to generate the high and low end of the range from individual records and would greatly reduce the data volumes that states and the Commission would have to work with and would aggregate the information to mask the actual detail on uptake levels, thus avoiding confidentiality issues.⁴⁹ If the Commission concludes that submission of data would be considered proprietary, then the Commission could

⁴⁴ MDTC/MGIS Jt. Comments at 4.

⁴⁵ MDTC/MGIS Jt. Comments at 4, *citing* Massachusetts General Laws Chapter 166A, Section 4, and Commission Form 100 at 6 (Nov. 2004) (requiring cable providers to submit strand maps as part of the franchise applications they file with the issuing authority and the MDTC).

⁴⁶ MDTC/MGIS Jt. Comments at 4.

⁴⁷ MDTC/MGIS Jt. Comments at 5. In the alternative, although this may raise privacy and confidentiality issues and is the least practical method, the Commission could require that data be filed at the individual address level.

⁴⁸ MDTC/MGIS Jt. Comments at 5.

⁴⁹ MDTC/MGIS Jt. Comments at 5.

require that the data be provided to states on a confidential basis.⁵⁰ Although this approach would deny advocacy groups and the general public access to very valuable information, state agencies would at least be able to aggregate the information and release it at a suitable level of detail.⁵¹

C. Data Collection and Broadband Mapping Require Clear Definitions That Align with those Ultimately Adopted by NTIA

Due to the consultative role assigned to the Commission by Congress with regard to the NTIA's implementation of the BTOP provisions of the ARRA,⁵² the Commission's Broadband Plan queries with regard to data collection and broadband mapping require clear definitions that align with those ultimately adopted by the NTIA. Admittedly, the Commission has received substantial input with regard to the proper definitions for "broadband," "unserved," and "underserved" following its March 24, 2009, Public Notice seeking comment in its Commission Consultative Role Docket. In fact, the MDTC and MBI offered their thoughts with regard to these particular definitions⁵³ and are reoffering them here for ease of reference in response to the Commission's "broadband capability" queries.⁵⁴ In addition, the Joint Commenters specifically

⁵⁰ MDTC/MGIS Jt. Comments at n.6.

⁵¹ MDTC/MGIS Jt. Comments at n.6.

⁵² Recovery Act § 6001(a) ("The [Assistant Secretary at NTIA], in consultation with the Federal Communications Commission ... shall establish a national broadband service deployment and expansion program"). Specifically, Congress directed NTIA to consult with the Commission on five specific terms and concepts: (1) the definition of "unserved area;" (2) the definition of "underserved area;" (3) the definition of "broadband;" (4) the non-discrimination obligations that will be contractual conditions of BTOP grants; and (5) the network interconnection obligations that will be contractual conditions of BTOP grants. *In the Matter of the Commission's Consultative Role in the Broadband Provisions of the Recovery Act*, GN Docket No. 09-40, Public Notice, DA 09-668, at 1-2 (citations omitted) (rel. Mar. 24, 2009) ("Commission Consultative Role Docket").

⁵³ VT DPS, MDTC, MBI Jt. Comments at 10-11.

⁵⁴ Broadband Plan NOI at ¶¶ 15-28.

address the Commission’s queries with regards to: (1) definitions of broadband used by other governmental agencies and whether any definition of “broadband” should be static or dynamic;⁵⁵ (2) whether the terms “advanced telecommunications capability,” “broadband,” and “high-speed Internet” should be unified;⁵⁶ and (3) the extent to which “access” to broadband should be considered relative to price and affordability or marketplace competition.⁵⁷

The Commonwealth’s General Laws define broadband to be “high-speed internet access, including wireless internet access, and as may be further defined by [MBI].”⁵⁸ The MBI has not yet established a specific broadband definition, although the Joint Commenters agree that any definition of broadband should be dynamic enough to account for changes and upgrades in technology. Furthermore, the Joint Commenters agree that the Commission should unify to some degree the terms “advances telecommunications capability,” “broadband,” and “high-speed Internet,” because of the increasing and inevitable overlap of broadband technologies and capabilities through different devices.

In addition, the Massachusetts Technology Collaborative, the entity which developed the Commonwealth’s 2007 broadband availability maps, implemented the definition of broadband as “a connection that can deliver at least 1Mbps download service” and “a broadband connection includes cable, fiber, DSL, WiMax, and WiFi but DOES NOT include dial-up or satellite.”⁵⁹ A

⁵⁵ Broadband Plan NOI at ¶ 18.

⁵⁶ Broadband Plan NOI at ¶ 16.

⁵⁷ Broadband Plan NOI at ¶¶ 25-26.

⁵⁸ Massachusetts General Laws Chapter 40J, Section 6B(a).

⁵⁹ John Adams Innovation Institute through the Massachusetts Technology Collaborative, “Where is Broadband Available? A complete list of Massachusetts municipalities and level of broadband available in each municipality,” at 1 (rel. June 7, 2007), available at <http://www.massbroadband.org/docs/data0807.pdf>.

definition of broadband was previously addressed in part by the MDTC and the MBI through the recommended definition of an “unserved” broadband area, which the Joint Commenters currently agree should be defined by the Commission as “an area where citizens have no facilities-based Internet access other than dial-up or satellite-based access.”⁶⁰ In addition, an “underserved” broadband area, should be defined as:

an area ... where broadband is physically or functionally unavailable to a segment of the population. Physical unavailability is obvious – if any members of the defined area do not have access to broadband, then it is physically unavailable to that segment of the population. Functional unavailability means that, although broadband may be physically available to certain residents or businesses, in practice the broadband service is not used or is functionally inaccessible to those residents. There may be many reasons why broadband is available but not used, and these reasons may include such factors as service quality, affordability, and a lack of competitive choices. In addition, one way to measure functional availability may be to measure penetration rates – for example, penetration rates [that are] a certain level below a state average may be an indicator of functional unavailability.⁶¹

The “underserved” area definition addresses in part how “broadband capabilities” should be defined through the listed factors addressing the availability of broadband: service quality, affordability, and a lack of competitive choices. Additional factors that need to be taken into account include, but are not limited to: redundancy, mobility, scalability, and the ability to build upon new or existing networks.⁶² As an additional point, the Commission should take into account measurements of “middle-mile” and “backhaul” connections as well as “last-mile” connections when determining “broadband capabilities.”⁶³

⁶⁰ VT DPS, MDTC, MBI Jt. Comments at 10.

⁶¹ VT DPS, MDTC, MBI Jt. Comments at 10.

⁶² VT DPS, MDTC, MBI Jt. Comments at 11.

⁶³ VT DPS, MDTC, MBI Jt. Comments at 11.

Metrics with regard to affordability and access should take into account, for instance, price for service at particular speeds in areas.⁶⁴ “If, for example, the ... speed of service is 528k but that level of service costs a customer \$60/month, then that area is essentially underserved by virtue of a lack of affordable speed.”⁶⁵ With regard to speed(s), including upload and download speeds, they should be measured by average speed during peak usage if possible.⁶⁶

D. Universal Service Should be Expanded to Include Broadband

In response to the Commission’s queries with regard to universal service,⁶⁷ the Joint Commenters affirm the MDTC’s previous position that universal service support should be expanded to include broadband.⁶⁸ Specifically, if the Commission were to incorporate broadband access into high-cost support, then it should establish a separate broadband fund for that purpose. In fact, the Commission should adopt the creation of a Broadband Fund comparable to that proposed by the Federal-State Joint Board on Universal Service (“Joint Board”).⁶⁹ The Joint Board recommended that a Broadband Fund should be:

⁶⁴ VT DPS, MDTC, MBI Jt. Comments at 11.

⁶⁵ VT DPS, MDTC, MBI Jt. Comments at 11.

⁶⁶ VT DPS, MDTC, MBI Jt. Comments at 11.

⁶⁷ Broadband Plan NOI at ¶¶ 39-41.

⁶⁸ MDTC Initial Comments, *In the Matters of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Inter-carrier Compensation Regime; Inter-carrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 01-92, 99-200, 99-68, 96-98, 96-45, WC Docket Nos. 06-122, 05-337, 04-36, 03-109, at 20-26 (filed Nov. 26, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520189008 (“MDTC ICC/USF Reform Comments”).

⁶⁹ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, (JB 2007) (“Comprehensive Reform Recommended Decision”).

“tasked primarily with disseminating broadband Internet services to unserved areas, with the support being expended as grants for the construction of new facilities in those unserved areas. A secondary purpose would be to provide grants for the new construction to enhance broadband service in areas with substandard service. Another secondary purpose would be to provide continuing operating subsidies to broadband Internet providers serving areas where low customer density would suggest that a plausible economic case cannot be made to operate broadband facilities, even after receiving a substantial construction subsidy.”⁷⁰

The Commission should reconsider, at least in part, the Joint Board’s recommendations. It is “states [that] are better suited than the Commission to effectively administer” the program and any “monies [should] first be allocated to the states, and thereafter awarded by designated state agencies to finance particular construction projects or the operations of broadband providers.”⁷¹ Available funding should not be limited to telecommunications carriers but should be made available, as deemed a strategic investment by the states, to any type of company that is capable of supporting broadband deployment. In addition, any available funding should be permitted to augment any state funding that may be provided.⁷² Such an approach would better encourage and support broadband deployment in rural areas than that provided by the Commission’s Alternate Reform Proposals released on November 5, 2008.⁷³

⁷⁰ Comprehensive Reform Recommended Decision, ¶ 12.

⁷¹ Comprehensive Reform Recommended Decision, ¶ 14.

⁷² For instance, in August 2008, Massachusetts Governor Deval Patrick signed into law *An Act Establishing and Funding the Massachusetts Broadband Institute and Broadband Incentive Fund* – legislation that leverages public and private resources to make high-speed Internet available in the state’s communities that currently lack access to broadband. See Massachusetts Office of Consumer Affairs and Business Regulation Press Release, “Governor Deval Patrick Signs Broadband Access Law” (rel. Aug. 4, 2008), available at http://www.mass.gov/?pageID=ocapressrelease&L=4&L0=Home&L1=Government&L2=Our+Agencies+and+Divisions&L3=Department+of+Telecommunications+and+Cable&sid=Eoca&b=pressrelease&f=080804_broadband&csid=Eoca.

⁷³ See *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation*

If the Commission expanded universal service high-cost support to include broadband, then, by necessity, universal service contributions would also need to be addressed. The Joint Commenters do not offer any recommendations on this point except to point out that the Commission would require further guidance from the Joint Board and should seek public comment on any new proposals. In addition, as already pointed out by the MDTC, if the Commission intends to implement new contributions requirements, then in the interests of fairness, it “should implement a new reporting requirement prior to implementing a new contributions methodology ... for a 12-month period. The [Commission] should then issue a report of the consolidated data, broken down by state, in order to help better determine appropriate contributions.”⁷⁴ Finally, the Commission “should apply a comparable system to Telecommunications Relay Service contributions, rather than require the [Universal Service Administrative Company] to maintain separate systems (and carriers to maintain separate reporting requirements).”⁷⁵

E. A Broadband Timeline Requires Estimated Dates of Resolution of Pending Issues at the Commission

There are several proceedings pending at the Commission that require resolution, especially with regard to Internet-protocol telephony and other Internet-related concerns and universal service.⁷⁶ Because many proceedings and issues have extended over several years, this

Regime; Inter-carrier Compensation for ISP-Bound Traffic; IP-Enabled Services, CC Docket Nos. 01-92, 99-200, 99-68, 96-98, 96-45, WC Docket Nos. 06-122, 05-337, 04-36, 03-109, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, Apps. A, C (rel. Nov. 5, 2008) (“*November 2008 Further Notice*”).

⁷⁴ MDTC ICC/USF Reform Comments at 25.

⁷⁵ MDTC ICC/USF Reform Comments at 26.

⁷⁶ See e.g., *In the Matters of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization*;

creates uncertainty in the market and in various industries and which can have numerous unintended and negative ramifications (including unnecessary resources expended as a result of numerous petitions and complaints consistently filed at both federal and state levels in both agency and court proceedings). Therefore, in order to move forward with any Broadband Plan, the Commission needs to incorporate estimated resolution times for many of its pending proceedings.

F. Any New Federal Consumer Protection Rules Should Clearly Preserve State Consumer Protections Rights and Afford State Enforcement Ability Where Appropriate

In response to the Commission's broadband consumer protection queries,⁷⁷ "a consumer protection "safety net" is ... appropriate and necessary given the increasingly pervasive and important role broadband plays in people's lives today."⁷⁸ If the Commission adopts federal consumer protection standards, then these standards should address, particularly for residential and small businesses, service quality and reliability of service (including but not limited to details with regard to the broadband service's capabilities), privacy and customer proprietary network information ("CPNI"), slamming, regulations with regard to service terminations (individual subscribers) and discontinuance of service (service areas), deceptive billing practices,

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services; Broadband Industry Practices, CC Docket Nos. 01-92, 99-200, 99-68, 96-98, 96-45, WC Docket Nos. 06-122, 05-337, 04-36, 03-109, 07-52.

⁷⁷ Broadband Plan NOI at ¶ 65.

⁷⁸ MDTC Reply Comments, *In the Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271, at 7 (filed Mar. 1, 2006), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518330150 ("MDTC Broadband Consumer Protection Reply Comments").

as well as advance notices with regard to price changes.⁷⁹ With clear guidance by the Commission, these standards should be enforceable by the states (in addition to the federal government) in either state court or before the applicable state commission as each state deems appropriate, since states are better-positioned to address all of the complaints that may arise.⁸⁰

As the MDTC has previously specified:

States have performed the consumer protection role efficiently and effectively. States are in a better position than the federal government to handle individual consumer complaints, whether on an informal basis or in a formal proceeding, and to address the unique conditions in each state ... Indeed, if consumers must seek relief beyond their state's borders [i.e., at the Commission], some consumers, particularly small business and residential consumers who lack resources, may be deterred from pursuing consumer protection complaints.⁸¹

In addition, states should be given not only the authority to enforce federal consumer protection standards, but also the authority to establish additional standards and requirements as the need arises,⁸² and any national standards adopted must not preempt or limit state authority under unfair and deceptive practices (“UDAP”) laws. Finally, violations of the standards should be considered violations of a state’s UDAP laws and subject to civil penalties and/or injunctive relief set forth in that state’s UDAP laws.

III. CONCLUSION

The Joint Commenters again applaud the Commission for its collaborative approach to implementing its Broadband Plan and agree with the Commission’s recognition of “the gravity and scope of this forward-looking undertaking [with regard to universal broadband availability],

⁷⁹ MDTC Broadband Consumer Protection Reply Comments at 4-6.

⁸⁰ MDTC Broadband Consumer Protection Reply Comments at 6.

⁸¹ MDTC Broadband Consumer Protection Reply Comments at 6.

⁸² MDTC Broadband Consumer Protection Reply Comments at 7.

the incredible value of ubiquitous broadband, and the difficulties that lie ahead in ensuring its availability.”⁸³ In today’s world, broadband availability is a necessary resource to all Americans that has quickly permeated and influences every level of our society. Going forward, continued collaboration will be necessary achieve the goal of universal, ubiquitous broadband throughout the country. Together we can succeed.

Respectfully submitted,

Massachusetts Broadband Institute

Commonwealth of Massachusetts
Department of Telecommunications and Cable

By:

By:

_____/s/_____
Sharon E. Gillett, Director

_____/s/_____
Carol E. Foltz, Interim Commissioner

⁸³ Broadband Plan NOI at ¶ 123.